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No. 88-311

Supreme Court, U.S.
FILED
SEP 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

EMPIRE LUMBER COMPANY,

Petitioner,

—against—

WASHINGTON WATER POWER COMPANY,

and

IDAHO PUBLIC UTILITIES COMMISSION,

Respondents.

BRIEF FOR RESPONDENT THE WASHINGTON WATER POWER COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF IDAHO

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QUESTIONS PRESENTED FOR REVIEW

Respondent, The Washington Water Power Company, respectfully submits that the questions presented for review may be described as follows:

A. Whether Petitioner's filing of a notice for self-certification pursuant to 18 C.F.R. §292.207(a) constitutes the incurring of a "legally enforceable obligation for the delivery of energy or capacity over a specified term" under 18 C.F.R. §292.304(d)(2), so as to entitle Petitioner to receive payment at the avoided costs effective on the date of the filing of the notice.

B. Whether PURPA precludes Respondent, the Idaho Public Utilities Commission, from determining that Petitioner was not ready, willing and able to undertake a legally enforceable obligation.

STATEMENT PURSUANT TO RULE 28.1

Respondent, The Washington Water Power Company, is incorporated in the State of Washington and qualified to do business in the State of Idaho. The Washington Water Power Company has no parent company. Its subsidiaries (except wholly-owned subsidiaries) and affiliates are the following:

Itron, Inc.
Limestone Company
Spokane Industrial Park, Inc.

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OPINIONS BELOW

The Idaho Public Utility Commission orders in this case, Order No. 20281 and Order No. 20693, are not reported, but appear in Petitioner's Petition for a Writ of Certiorari at Appendix A. Citations in this brief to those decisions will refer to Petitioner's Appendix. The decision

of the Supreme Court of the State of Idaho in this case is reported at *Empire Lumber Company v. Washington Water Power Company*, _____ Idaho _____, 755 P.2d 1229 (1987).

STATUTORY PROVISIONS INVOLVED

The text of Section 210 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §824a-3 (1982) and 18 C.F.R. Part 292 (1987) appear in Appendices D and E to Petitioner's Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

This case concerns a PURPA developer's entitlement to receive payments for power to be generated from a proposed project at avoided costs which have been superceded by order of a state regulatory commission.[1] From another perspective, this case concerns the right of a state regulatory commission to determine when parties are entitled to receive payments based upon avoided costs which have been established by that commission. The Idaho Supreme Court affirmed decisions of the Idaho Public Utilities Commission ("IPUC" or "Commission"),[2] which denied Empire Lumber Company's ("Empire's") request for an order directing The Washington Water Power Company ("WWP") to enter into a contract with Empire for the purchase of electricity at superceded avoided costs.

---

[1]/ "Avoided costs" means the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source. 18 C.F.R §292.101(b) (6) (1988).

[2]/ The IPUC is the State of Idaho agency authorized and directed to supervise and regulate electrical utilities and their rates, as well as investigate and review contracts, and hear complaints against utilities alleging violation of law or any rule or order of the Commission. *Empire Lumber Company*, _____ Idaho at _____, 755 P.2d at 1230; see *Afton Energy, Inc. v. Idaho Power Company*, 111 Idaho 925, 729 P.2d 400 (1986).

On September 6, 1985, the IPUC ordered WWP to refile its schedule of avoided costs under PURPA for review and revision. This case originated on September 23, 1985, when Empire filed a complaint with the IPUC requesting that the Commission order WWP to execute a long-term, fixed-rate contract with Empire at the then applicable avoided costs. Thereafter, on October 10, 1985, Empire filed with the Federal Energy Regulatory Commission ("FERC") a notice of self-certification that it intended to construct a facility qualified under PURPA.

Subsequent to the filing of Empire's complaint, a revised schedule of avoided costs was ordered into effect by the Commission on January 14, 1986. The revised avoided costs were lower than the superceded avoided costs and would have resulted in smaller payments to Empire for the same amount of electric power sold to WWP. Grandfathering under the superceded avoided costs was made available "to those cogenerators or small power producers (CSPPs) who had filed a complaint with the Commission on or before January 13, 1986, and who were determined by this Commission to be otherwise entitled . . . to obtain such rates." Commission Order No. 20693, [Petitioner's App. 6].

The result obtained in this case below—a denial of Empire's complaint—follows from the Commission's determination of fact that at no time was Empire ready, willing and able to sign a contract with WWP, and therefore it failed to perfect its right to receive a contract at the superceded rates.

ARGUMENT

A. THE STATE DECISIONS BELOW PROPERLY EXAMINED EMPIRE'S INTENTION TO UNDERTAKE AN OBLIGATION IN COMPLIANCE WITH THE FERC REGULATIONS.

1. FERC regulations compel an inquiry into the willingness of a potential qualifying facility developer to undertake an obligation.

Entitlement to receive payment based upon avoided costs depends upon the nature of the commitment proposed to be undertaken by the qualifying facility developer. The FERC regulations differentiate between two types of sales from a qualifying facility developer. The FERC regulations differentiate between two types of sales from a qualifying facility to a utility:

> *Purchases "as available" or pursuant to a legally enforceable obligation.* Each qualifying facility shall have the option either:
>
> (1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the the purchasing utility's avoided costs calculated at the time of delivery; or
>
> (2) To provide energy to capacity pursuant to *a legally enforceable obligation* for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:
>
> (i) The avoided costs calculated at the time of delivery; or
>
> (ii) The avoided costs calculated *at the time the obligation is incurred.*

18 C.F.R. 292.304(d) (Emphasis added).

The preceding section establishes a nexus between the extent of the obligation to be undertaken by the qualifying facility developer and the basis upon which payment is to be calculated. If the qualifying facility developer desires payment based upon a fixed rate over a period of time, then it has to commit to a "legally enforceable obligation." Implied by a "legally enforceable obligation" is a sufficiently precise statement of the quantity of power to be supplied and commitment by the developer, so that the utility may rely upon the contract to defer to replace other arrangements that the utility would be required to undertake to acquire power for its customers' needs. This implication appears clearly in the FERC comments which were published upon adoption of the regulations:

> In order to defer or cancel the construction of new generating units a utility must obtain a commitment from a qualifying facility that provides *contractual or other legally enforceable assurances* that capacity from alternative sources will be available sufficiently ahead of a date on which the utility would otherwise have to commit itself to the construction or purchase of new capacity. *If a qualifying facility provides such assurances,* it is entitled to receive rates based on the capacity costs that the utility can avoid as a result of its obtaining capacity from the qualifying facility.

45 Fed.Reg. 12,214 (1980), *reprinted in* FERC Regulations Preambles 1977-1981 (CCH 1981), ¶30,128 at p.30,882. (Emphasis added).

2. **Granting the petition would necessitate a reexamination of the factual record.**

Empire asserts that a utility's obligation to offer to purchase electric power arises as of the date the facility becomes federally qualified, and that the decisions by the IPUC constitute state regulation which is preempted by

PURPA and its regulations. However, the IPUC decisions below did not focus upon the engineering or other technical specifications that must be met for an electric power facility to be qualified under PURPA, but upon Empire's actual willingness to undertake an obligation to supply electric power — an issue of fact.

Both of the Commission decisions recite many facts in evidence tending to show an absence of the requisite readiness, willingness, or ability on Empire's part to undertake a legally enforceable obligation to supply energy.

In its first decision, the Commission stated that at no time had Empire indicated a willingness to bind itself to a complete contract. Commission Order No. 20281, [Petitioner's App. 3]. Additionally, the Commission noted:

> A Complaint should not be brought to the Public Utilities Commission until every effort is made to actively negotiate and conclude a contract. In addition, a CSPP [co-generator or small power producer] is not entitled to contract rates until it is ready, willing and able to sign a contract. In most cases this will entail making a comprehensive binding offer, showing with reasonable specificity design and size characteristics and indicating a willingness to rely on proposed contract terms and proceed thereunder. In this case Empire has not complied with any of these requirements on or before January 14, 1986. Therefore, it is not entitled to rates authorized by Order No. 18988 on July 6, 1984.

Commission Order No. 20281, [Petitioner's App. 4].

Rehearing on the complaint was held before the Commission on May 8, 1986. However, the Commission noted, "the supplementary record does little to ameliorate or lessen the conviction or prior findings of the Commission. On the contrary, many of our findings are further supported." Commission Order No. 20693, [Petitioner's App. 10].

The Commission's decision also commented upon several evidentiary matters which were more fully developed during the rehearing. Empire's complaint before the Commission stated that Empire sought to enter into a power sales agreement with WWP in order to locate a small power plant of less than 10 megawatts in the immediate vicinity of its lumber mill in Kamiah, Idaho. Commission Order No. 20693, [Petitioner's App. 7]. However, the Commission noted that prior to the filing of the complaint, Empire had not represented to WWP that the location of the project would be at Kamiah. *Id.*

Additionally, the Commission pointed out:

> The laundry list of unnegotiated issues in this case clearly dictates that the parties were far from being ready, willing and able to sign a contract. Empire has never indicated or expressed a willingness to bind itself to a complete contract.

Commission Order No. 20693, [Petitioner's App. 11-12]. In particular, the Commission noted that:

> If any one fact can be pointed to as reason justifying this Commission's determination that Empire was neither entitled to a contract nor to grandfathering under the -190 rates it is that Empire has never committed itself to the sizing of the project with any specificity.

Commission Order No. 20693, [Petitioner's App. 12].

Moreover, the Commission held that, "[t]he facts support a finding that the output of the proposed facility is still unknown." Commission Order No. 20693, [Petitioner's App. 13].

On appeal, the Idaho Supreme Court affirmed the ruling of the Commission. The Idaho Supreme Court held that "the evidence clearly supported the decision of the Idaho Public Utilities Commission that Empire at no time was ready, willing and able to enter into a binding

contract with Washington Water Power." *Empire Lumber,* 755 P.2d at 1231-32. Further, the Idaho Supreme Court stated:

> We deem it clear that the intent of PURPA is not to require an electric utility company to enter into a contract to purchase electrical power from an entity which in essence only desires to obtain an option to sell some amount of electrical power to be generated at some plant of unknown size or capacity.

Id.

The Commission's decisions, as affirmed by the Idaho Supreme Court, examined Empire's willingness and ability to undertake an obligation to supply energy. This type of analysis is required by 18 C.F.R. §292.-304(d)(2) which explicitly pegs the applicable avoided costs to the time that the developer incurs an obligation to supply the energy.

B. THE IPUC HAD THE LATITUDE UNDER THE STATUTE AND THE REGULATIONS TO RENDER THE DECISIONS BELOW.

The IPUC is required to implement PURPA. PURPA §210(f), 16 U.S.C §824a-3(f). However, PURPA and the regulations thereunder afford state regulatory authorities great latitude in determining the manner in which the regulations are to be implemented. *Federal Energy Regulatory Commission v. Mississippi,* 456 U.S. 742, 751 (1982); 18 C.F.R. §292.401(a). Since the adoption of its regulations, FERC has given considerable deference to individual state regulatory authorities which have implemented PURPA. *See, e.g., Middle South Services, Inc.,* 33 FERC ¶61,408 at p. 61,786. Ironically, if Empire's petition is granted, this Court will be inquiring into a narrow issue of regulatory commission implementation of FERC regulations, when it appears that the regulatory commissions are intended by FERC to have considerable discretion in their manner of implementation.

Furthermore, there is no requirement for states to adopt standardized schedules of avoided costs applicable to projects with a generating capacity greater than 100 kilowatts. 18 C.F.R. §292.304(c)(2). Although the IPUC adopted such a schedule of which Empire desires to enjoy the benefits, Idaho need not maintain similarly designed schedules of avoided costs in the future. For that reason, the granting of Empire's petition would result in this Court reviewing a very narrow area of concern—the IPUC's implementation of its own standardized schedules of avoided costs.

C. THE PETITION, IF GRANTED, WOULD NECESSITATE SIGNIFICANT INTERPRETATION OF FERC REGULATIONS WHICH ARE IN THE PROCESS OF BEING AMENDED.

The FERC is proposing to amend its regulations governing the implementation of Title II of PURPA, specifically, the certification procedures for qualifying facilities and the technical standards for co-generation of small power production facilities. FERC Docket No. RM88-17-000, 53 Fed.Reg. 31,021-01. Empire's petition is predicated in part upon these certification procedures which may be substantially changed. Therefore, a review of this case may have limited precedential value.

D. THE DECISIONS BELOW DO NOT CONFLICT WITH THE DECISIONS OF OTHER JURISDICTIONS.

An analysis of those decisions identified by Empire are easily distinguishable from the decisions in this case.

Snow Mountain Pine Co. v. Maudlin, 84 Ore.App. 590, 734 P.2d 1366, *rev. denied,* 303 Ore. 591, 739 P.2d 571 (1987). This decision involved a determination of the date for which avoided costs were to be determined in calculating the purchase price for power produced by a qualifying facility. Citing, in part, Oregon statutes, the Oregon Court of Appeals held that the utility's obligation to pur-

chase power arose when the qualifying facility developer tendered a contract to provide power:

> [T]he regulations and administrative rules contemplate that a qualifying facility's self-imposed obligation *to deliver energy* triggers a utility's obligation *to purchase energy*. The date on which the qualifying facility obligates itself to deliver energy fixes the date on which the 'avoided costs' are determined.

734 P.2d 1366, at 1371. The facts in this case are distinguishable because, unlike *Snow Mountain Pine Company*, the IPUC determined that Empire was never ready, willing and able to sign a contract.

Florida Power & Light Co. v. FERC, 711 F.2d 219 (D.C.Cir. 1983), did not involve a qualifying facility developer's right to an avoided cost rate after that rate had been superceded. Instead it concerned the sufficiency of a self-certification under PURPA for a small power production facility which, unlike the Empire project, had already been constructed. The Court of Appeals for the D.C. Circuit held that the FERC was within its discretion in refusing to disturb the self-certification by one of the parties which claimed to own the facility, pending state court determination of legal ownership. The Court of Appeals noted, "we find this [FERC's] reasoning and its implied deference to pending state court proceedings within the agency's discretion." 711 F.2d 219, at 223.

Consolidated Edison Co. v. Public Service Comm'n., 63 N.Y.2d 424, 472 N.E. 2d 981 (1984), *appeal dismissed*, 470 U.S. 1075 (1985), involved state legislation establishing criteria for the qualification of facilities and prices for the purchase of power different from those required by PURPA. Similarly, *Kansas City Power & Light v. State Corporation Commission*, 234 Kan. 1052, 676 P.2d 764, *appeal dismissed*, 470 U.S. 1075 (1985), and *Orange and Rockland Utilities, Inc.*, 43 FERC ¶61,067 at p. 61,185, involved a state regulatory agency's establishment of an

avoided cost rate greater than the federally regulated rate.

Because none of the decisions above, with the exception of *Snow Mountain Pine Company,* which is distinguishable on the facts, dealt with the entitlement of a qualifying facility developer under a schedule of avoided costs after that schedule had been superceded, none of the cases conflict directly with the decision of the Idaho Supreme Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Idaho should be denied.

RESPECTFULLY SUBMITTED this 2d day of September, 1988.

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